No. 42933-1-II

COURT OF APPEALS, DIV. II

OF THE STATE OF WASHINGTON

In re the Estate of MARK EUGENE DUXBURY,
Deceased.

SOJOURNER T. DUXBURY, Appellant,

and

CHINYELU DUXBURY, Respondent.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Appellant Sojourner Duxbury here replies to the brief of respondent Chinyelu Duxbury filed June 7, 2012 ("Respondent's Brief" or "Resp. Br."). Chinyelu makes multiple references to the 2008 federal district court and 2009 federal appeals court opinions in Mark Duxbury's False Claims Act litigation: ***United States ex rel. Duxbury v. Ortho Biotech Products***, 551 F. Supp.2d 100 (D.Mass. 2008) (***"Duxbury USDC"***) and ***United States ex rel. Duxbury v. Ortho Biotech Products***, 579 F.3d 13 (1st Cir. 2009).

KEY PROVISIONS OF THE FALSE CLAIMS ACT

Respondent's Brief appears to misstate and conflate certain provisions of the qui tam section of the federal False Claims Act ("FCA"), 31 U.S.C. § 3730, a copy of which is in the appendix to Sojourner's opening brief ("App. Br."). That section, at its paragraphs (b)(1) and (b)(2) reads in relevant part:

> (b) Actions by private persons.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. ...
> (2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. ...

Notice that paragraph (b)(2) does not require the qui tam plaintiff

("realtor") to disclose any information to the federal government before filing the complaint in a federal court to commence his or her civil action.

Paragraph (b)(5) states what is commonly referred to as the "first-to-file rule" that bars qui tam actions based on facts underlying a previously filed qui tam action:

> (5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

Paragraph (e)(4) states what are commonly referred to as the "public disclosure bar" and the "original source exception" to that bar. In 2010, Congress amended paragraph (e)(4) (Appendix to App. Br.). Mark's qui tam claim is governed by the paragraph as it read before that 2010 amendment (CP at 45), as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

So if a relator's FCA action is "based upon" allegations that previously were publicly disclosed in a proceeding, report, or news account, the

action must be dismissed unless the relator qualifies as an "original source," that requires both that the relator (1) have direct and independent knowledge of the information supporting the action, and (2) have disclosed the information to the government before filing his or her FCA action.

COMMENTS ON RESPONDENT'S BRIEF

1. The Undisputed Key Fact. Chinyelu acknowledges, Resp. Br. at 2, that "Mark Duxbury learned of the kickback scheme and off-label use while working for Ortho Biotech." and "He was fired in 1998." That is consistent with the unchallenged finding stated in paragraph 1 of the superior court's order of October 6, 2011, (CP at 71):

> 1. While the Decedent was employed from 1992 to July 20, 1998, by Ortho Biotech Products LP (OBP) he learned information that led him in November 2003 to file in federal court against OBP a claim under the False Claims Act (FCA), 31 U.S.C. § 3730.

2. Page 5 Misstatement. Chinyelu asks and answers, Resp. Br. at 5, her question about when a relator acquires a property interest in his or her FCA claim:

> "When is the property interest in the Federal Claims Act, qui tam claim for the relator created? [sic] The statute says a claim is initiated by filing the action."

But no provision of the FCA "says" any such thing. The statute simply describes the procedure for a relator to commence a qui tam judicial proceeding on a his or her FCA right of action. 31 U.S.C. § 3730(b)(1)-(2). The statute does not address the question of when a relator *acquires* his or her right of action. But that question was directly addressed in ***U.S. ex rel. Hyatt v. Northrup Corp.***, 91 F.3d 1211 (9th Cir., 1996), in which the court stated at 1217:

> "Once the *qui tam* plaintiff has the requisite information, he cannot sleep on his rights. He is "charged with responsibility to act under the circumstances." Thus, as to the *qui tam* plaintiff, the three-year extension of the statute of limitations begins to run once [the] *qui tam* plaintiff knows or reasonably should have known the facts material to his right of action."

3. Page 6 Misstatement. Chinyelu misstates, Resp. Br. at 6, the U.S. Supreme Court's opinion in ***Vermont Agency of Natural Resources v. United States ex rel. Stevens***, 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), by making the following assertion:

> "The United States Supreme Court held that a claim [is] initiated by filing with the government. The court quoting the statute found that a claim is initiated when the relator makes the §3730(b) filing. [Cite to pages 770-73 of ***Stevens***.] If the claim is initiated by filing, then before the filing the claim has not been initiated. That means the qui tam plaintiff's claim does not exist in relationship to the Federal Claims Act prior to the filing required by the statute."

But the U.S. Supreme Court in ***Stevens*** said no such thing. The closest

passage to this in its opinion was the following at 669 that referred to a relator's initiation of a "FCA action"—a judicial proceeding:

> "If a relator initiates the FCA action, he must deliver a copy of the complaint, and any supporting evidence, to the Government, § 3730(b)(2), which then has 60 days to intervene in the action, §§ 3730(b)(2), (4)."

The ***Stevens*** opinion held, at 773, that *the FCA statute itself* effects a partial assignment to a relator of the government's cause of action for the false claim: "The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim." Contrary to Chinyelu's assertions, the court did not find any contractual assignment of the government's claim or that any assignment takes place when a relator files his FCA complaint or provides it to government officials.

Chinyelu notes a 1993 Ninth Circuit opinion that found a relator to have Article III standing by viewing his rights as resulting from a unilateral contract. ***U.S. ex rel. Kelly v. Boeing Co.***, 9 F.3d 743 (9th Cir.1993). But seven years later the U.S. Supreme Court rejected that viewpoint in ***Stevens*** at 773, not even citing the ***Kelly*** case.

The ***Stevens*** court based its ruling that a relator has Article III standing in part upon the history of "informer statutes" in England and in the United States. Describing English statutes enacted in the 14th century, the court at 775 observed, "Most, though not all, of the informer statutes expressly gave the informer a cause of action, typically by bill, plaint,

information, or action of debt." And concerning early qui tam statutes in the United States, the court wrote at 776-77:

> "[I]mmediately after the framing, the First Congress enacted a considerable number of informer statutes. Like their English counterparts, some of them provided both a bounty and an express cause of action; others provided a bounty only." [Footnotes omitted.]

As further discussed at App. Br. at 7-8, the U.S. Supreme Court in ***Stevens*** held that a relator has a personal cause of action under the FCA.

4. Page 8 Misstatement. Chinyelu asserts, Resp. Br. at 8, that "The relator cannot file a lawsuit until the relator provides information about the fraud to the government." That is not correct. In support for this misstatement, Chinyelu quotes a passage from ***Duxbury USDC*** that was addressing the original source exception to the public disclosure bar—which exception *does* require the relator to disclose his information to government officials prior to filing his qui tam action. In Mark's qui tam case, the original source exception became applicable to his kickback claim because similar allegations had been publicly disclosed in a class action lawsuit filed in September 2002, slightly over a year before Mark filed his original FCA action in November 2003. ***Duxbury USDC*** at 106. But because Mark learned the facts supporting his kickback claim while employed by OBP from 1992 to 1998, he certainly could have filed his FCA claim—without having to first disclose his information to the

government—at any time during his employment, or in 1999, in 2000, in 2001, or in 2002 before September.

5. Page 9 Unsupported Statement. Chinyelu asserts, Resp. Br. at 9, that "Duxbury did not have the right to file a lawsuit until he provided information to the federal government. Mr. Duxbury provided information to the government during his marriage." Nothing in the record supports Chinyelu's assertion that Mark provided information to the government *during his marriage.* The federal district court judge merely observed, ***Duxbury USDC*** at 109, that Mark claimed to have provided information to the government *sometime* before he filed his complaint:

> "In his position as a Product Specialist and later Regional Key Account Specialist for OBP's Western Division Oncology sales force, Duxbury was responsible for the promotion and sale of Procrit in the western United States. The complaint alleges that, at defendant's direction, he gave providers free samples of Procrit and instructed the providers to submit Medicare claims for the samples,[citation to complaint paragraphs] and directly provided discounts, rebates, educational grants, and other "off-invoice" discounts to providers to lower the actual acquisition cost of Procrit, [citation to complaint paragraphs]. His knowledge of the alleged fraud is both independent and direct. Duxbury also alleged in his initial complaint instigating the action that he had provided the information to the government prior to filing the suit [citation to complaint paragraph]. Duxbury therefore qualifies as an original source."

6. Page 10 Unsupported Statement. Chinyelu asserts, Resp. Br. at 10, that "In this case, the marital community funded the prosecution of this qui tam claim." Nothing in the record supports this assertion, even it were relevant. And it is generally recognized that the lawyers and law firms that specialize in qui tam litigation generally fund the litigation themselves.

7. Page 12 Unsupported Statement. Chinyelu asserts without persuasive argument, Resp. Br. at 12, that "The time the claim accrues and the time the property interest is created for the relator are different." In partial support of that assertion, Chinyelu repeats her mistaken premise, *id.*, "Before they [relators] can sue, they must bring their information to the federal government, the injured party."

A "cause of action," "right of action," or "claim for relief" is a property right, so when a person accrues a cause of action they have acquired a property right. ***Schneider v. Biberger***, 76 Wash. 504, 506, 136 P. 701 (1913) ("The cause of action having arisen during the existence of the community, the damages would be community property, as the community status of property is determined and fixed at the time the property is acquired.")

In both state and federal law the limitations period within which a claim may be brought generally begins when the claimant accrues the

claim. In ***Jones v. Jacobsen***, 45 Wash.2d 265, 273 P.2d 979 (1954), the court stated the law as follows, quoting from a treatise that it quoted in one of it earlier opinions:

> "Statutes of limitations commence to run against a cause of action from the time it accrues, or from the time when the holder thereof has the right to apply to the court for relief, and to commence proceedings to enforce his rights. The time when a cause of action was accrued within the statutes of limitations means the time when plaintiff first became entitled to sue."

And in ***Browning v. Howerton***, 92 Wash.App. 644, 966 P.2d 367 (1998), the court stated at 651:

> "As a general principle, a statutory limitation period commences and a cause of action accrues when a party has the right to seek relief in the courts."

And federal law is the same, as stated by the court in ***Acri v. International Ass'n of Machinists & Aerospace Workers***, 781 F.2d 1393 (9th Cir. 1986), at 1396:

> "Under federal law a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action."

8. Page 14 Misstatement. Chinyelu asserts, Resp. Br. at 14, that "No Federal court has said possession of information creates a property interest for a relator in a qui tam case." But the Eighth Circuit did say that in ***U.S. ex rel. Gebert v. Transp. Admin. Services***, 260 F.3d 909, 913 (8th Cir. 2001):

> "Under the Bankruptcy Code, 11 U.S.C. § 541(a)(1) (1994), all of the debtors' legal and equitable interests are transferred to the bankruptcy estate at the time the bankruptcy petition is filed. .... Most importantly, the property of the bankruptcy estate includes all causes of action that the debtor could have brought at the time of the bankruptcy petition. [Citation omitted.]
>
> "The record shows that, as of July 1994 **when the Geberts filed for bankruptcy, they possessed all of the information necessary to file the qui tam claim** against TAS and Steward. The law is clear that once the Geberts filed the bankruptcy petition in 1994 all of **their property rights** and interests **became assets of the bankruptcy estate.** [Citation omitted.] Accordingly, **at the time the Geberts filed the qui tam claim, the claim had long since passed to the bankruptcy estate** and the Geberts no longer had standing to bring it." [Emphasis added.]"

Chinyelu attempts, Resp. Br. at 18, to distinguish this ***Gebert*** case by unpersuasively asserting, "The fact that a thing must be included in a bankruptcy petition does not prove that thing is actual property." But as the Washington State Supreme Court recognized at least 99 years ago in ***Schneider***, *supra*, a cause of action is a property right.

Similarly, the Fourth Circuit recognized in ***U.S. ex rel. Radcliffe v. Purdue Pharma L.P.***, 600 F.3d 319, 329 (4th Cir. 2010), that a FCA cause of action, once its supporting facts are known to a relator, is a property interest, rejecting the relator's argument (here made by Chinyelu) that it did not become a property interest until the FCA claim was actually filed. The court stated at 329:

> "[O]nce the government suffered an injury (and Radcliffe became aware of the fraud causing the injury), Radcliffe had a statutory claim, and the necessary legal standing as partial

assignee, to file a qui tam lawsuit.

" In short, he had "an interest in the lawsuit" regardless of when he opted to vindicate it. The fact that Radcliffe chose not to file suit until after signing the Release does not negate the fact that he had the right to file suit beforehand—a right he waived under the terms of the Release." [Footnotes omitted.]

9. Page 19 Misstatement. Chinyelu asserts, Resp. Br. at 19, that Mark could not have filed his FCA action before 2002 because he relied on information that was publicly disclosed in claims filed by others in 2002. That assertion is contrary to the unchallenged finding stated in paragraph 1 of the order of October 6, 2011, (CP at 71), and there is nothing in the record to support that assertion. The federal district court judge explained that in determining initially whether the public disclosure bar applied, she adopted the majority rule "which states that an action is 'based upon' a public disclosure 'when the supporting allegations are similar to or the same as those that have been publicly disclosed ... regardless of where the relator obtained his information.'" ***Duxbury USDC*** at 107. So because Mark's kickback allegations were "similar to" those publicly disclosed in the Master Consolidated Class Action ("MCCA") complaint filed in September 2002, the public disclosure bar applied to Mark's kickback allegations. Nothing indicates that Mark was unable to file his FCA complaint with his kickback allegations before the MCCA complaint was filed in 2002.

10. FCA Claim Not Onerously Acquired by Marital Community.

Sojourner's alternative argument is that even if Mark acquired after his marriage the right to a share of any FCA claim proceeds, such a right would be his separate property because it was not acquired onerously by the toil, talent, or other productive faculty of either spouse. CP at 78-80; App. Br. at 16-20. In response, Chinyelu merely asserts—without any basis in the record—the following (Resp. Br. at 21):

> "She supported Mark Duxbury while he was unemployed. She helped him with the claim. The community bore the expense of the gathering the documentation to support the claim, finding appropriate counsel, and assumed the risk if the claim were found to be frivolous."

Chinyelu has simply failed to assert any basis for the court to conclude that Mark's acquisition of his right to FCA claim proceeds (that she argues occurred by Mark's act of filing his FCA complaint) resulted from the labor or industry of their marital community. In fact, it was purely fortuitous that Mark learned of OPB unlawful actions during his employment by that company from 1992 to 1998, and his sharing that information with his lawyer who put it into a FCA complaint and shared it with the government required no toil or labor by Mark.

Chinyelu has not shown that Mark's right to share in any proceeds from his FCA action was acquired by onerous title.

CONCLUSION

Chinyelu's Respondent's Brief is replete with inaccurate statements and statements that are unsupported by the record. The brief should be read carefully and critically, along with the key case opinions such as ***Stevens***, ***Radcliffe***, ***Gebert***, and ***Hyatt***. The case law is clear and consistent that a relator acquires a property right in a FCA cause of action once he or she learns the material facts supporting it.

Respectfully submitted this 9th day of July, 2012.

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Proof of Service

I certify that today I delivered a copy of this Reply Brief with this Proof of Service to opposing counsel Hari Alipuria, at 902 S 10th St, Tacoma, WA.

July 9, 2012

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